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No. 91-2003

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF CALIFORNIA and CALIFORNIA STATE BOARD OF EQUALIZATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS ON THE MERITS

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 26 U.S.C. § 6532 provides in relevant part:

(a) Suits by taxpayers for refund.

> (1) General rule – no suit or proceeding under section 7422 (a) for the recovery of any internal revenue tax, penalty, or other sum shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates. . . .

2. California Constitution Article XIII, section 32 provides:

> No legal or equitable process shall issue in any proceeding in any court against this state or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.

3. California Revenue and Taxation Code section 6902 provides in relevant part:

> (a) For taxpayers filing returns on other than an annual basis . . . no refund shall be approved by the board after three years from

> the last day of the month following the close of the quarterly period for which the overpayment was made. . . . For taxpayers filing returns on an annual basis . . . no refund shall be approved by the board after three years of the last day of the calendar month following the one year period for which the overpayment was made. . . .

SUMMARY OF ARGUMENT

In *United States v. New Mexico*, 455 U.S. 720 (1982), this Court changed the rules concerning state taxation of federal contractors. That case held that a federal contractor could not take advantage of the tax immunity of the United States unless the contractor was virtually a constituent part of the government. Prior to 1982, the rules in effect for a federal contractor challenge to a state tax required only that the state tax did not interfere with the performance of federal functions. Under the pre-1982 rules, when the issue of interference was raised, as it invariably was, the federal contractor could take advantage of the United States tax immunity if it proved its case. *In United States v. New Mexico*, this Court considerably narrowed the test for a federal contractor to be able to take advantage of the United States' tax immunity.

When, as in this case, the contractor does not meet the test in *United States v. New Mexico* for tax immunity, and the United States cannot sue on the basis of its own sovereign immunity from state taxation, the United States, like any other citizen or entity lacking a sovereign immunity defense, becomes subject to state law with regard to statutes of limitations, particularly when the

limitations provide a condition precedent for the continuing existence of a cause of action. The only cause of action that the United States can assert under California law is one based on subrogation. In such an action, the subrogee merely steps into the shoes of the subrogor, and if the subrogor had no cause of action when the subrogee's suit is filed, the subrogee has no cause of action. When the rights of the subrogor are extinguished, any rights of the subrogee are extinguished. The United States, as the subrogee of Williams Brothers Engineering Co., ("WBEC") had no cause of action when it filed suit in this case because WBEC's rights against respondents had expired.

The argument of the United States is that under the law in effect prior to this Court's decision in *United States v. New Mexico* the United States has a quasi-contract cause of action with a longer statute of limitations under federal law. While that argument may be correct if the federal contractor can take advantage of the United States tax immunity under the test enumerated in *New Mexico*, it ignores the fact that such immunity was not claimed and has not been shown in this case. The United States has no cause of action under federal law because it does not have a quasi-contract cause of action when, as here, the tax cannot be treated as having been imposed upon the United States in violation of the United States' sovereign immunity.

In relying on decisions providing the United States with an action in quasi-contract when the United States is to be treated as the taxpayer, the United States fails to recognize the inherent basis of this Court's decision in *United States v. New Mexico*.

ARGUMENT

I

THIS COURT'S DECISION IN *UNITED STATES v. NEW MEXICO*, 455 U.S. 720 (1982) CONTROLS THE ANALYSIS THAT MUST BE MADE IN THIS CASE

State taxation of federal instrumentalities has had a long history beginning with Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). "[T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *Id.* at 436. Subsequent decisions of this Court followed the *McCulloch* decision by holding that a state tax on income or assets a private party receives from a contract with the federal government imposed a burden on government operations. See *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829); *Dobbins v. Commissioners of Erie County*, 78 U.S. (11 Wall.) 113 (1871); see also discussion in *California Equalization Bd. v. Sierra Summit*, 490 U.S. 844, 848 (1989).

The case of *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937) changed the ability of a federal contractor to claim the immunity from taxation that the government enjoys. This Court upheld a gross receipts tax imposed upon a federal contractor by West Virginia, holding that the tax did not interfere in any substantial way with the performance of federal functions. However, the *James* decision did not end the dispute regarding state taxation of federal contractors, because after 1937 the United

States and/or the contractor could claim that the relationship between the contractor and the government was such that the state tax did interfere with the performance of federal functions. *Id.* at 161.

This Court settled the controversy in *United States v. New Mexico*. In that case, this Court held that only one relationship could result in the contractor being able to take advantage of the United States, immunity: "[W]hen the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *Id.* at 735. *New Mexico* made it more difficult for federal contractors to claim the tax immunity of the United States. If the contractor can claim the tax immunity of the United States under the *New Mexico* rules, the law has not been changed. What has been changed is that for the first time there is a significant group of contractors where it cannot be alleged that the United States tax immunity applies. This case presents this Court, for the first time, with the question of what remedy the United States possesses when the federal contractor cannot claim the immunity of the United States.

If the federal contractor can come within the test of *New Mexico* and claim the tax immunity of the United States, there should be no doubt that a quasi-contract cause of action would arise in favor of the United States. The United States would be on solid legal ground, in that instance, to claim it had been damaged by the action of the state in exacting taxes on an exempt entity. *United States v. State of Mich.*, 851 F.2d 803 (6th Cir. 1988). In the case at bar, however, the United States has effectively

made no claim that the California tax is on the United States, nor does it claim that WBEC is an entity that is so closely connected to the government that the two cannot be viewed as separate entities. (Joint Appendix, hereafter "J. A." 5-11, 136-137, 153-154).

These rules, sometimes denominated the doctrine of intergovernmental immunities, were developed in order to navigate the potential mine field of clashing sovereignties. The national government is sovereign in its sphere of required activities, and the states retained some attributes of sovereignty upon entering the union. The states' power to tax for their own needs, without infringing upon the United States, was one of the attributes of sovereignty retained by the states. *Ohio Oil Co. v. Conway*, 281 U.S. 141, 159 (1930).

There is no question that this case does not involve the United States sovereign immunity, because the United States told the district court "[t]he defendants have also argued that there is no constitutional prohibition to the imposition of the tax on WBEC, but that issue was not raised in the plaintiff's complaint or motion for summary judgment and is not an issue in this case." J. A. 154; *United States v. State of California, et al.* 932 F.2d 1346, 1348 (9th Cir. 1991) (Pet. App. 4a, 5a, 6a). It has been held that the incidence of the tax under the California statute at issue in this case does not fall on the United States. *In re Howell*, 731 F.2d 624, 628 (9th Cir. 1984), *cert. den.* 469 U.S. 933; see also *United States v. California State Bd., etc.*, 683 F.2d 316 (9th Cir. 1982). The primary question in this action is whether the United States can state a cause of action for quasi-contract, and thus avail itself of the six-year statute of limitations contained in 28 U.S.C. § 2415, when the contractor, not the United States, is the true taxpayer.

II

THE UNITED STATES FAILS TO DEMONSTRATE THAT IT CAN RAISE ANY FEDERAL LAW CAUSE OF ACTION IN THIS CASE

While it may be agreed that 28 U.S.C. section 2415 provides for a six-year statute of limitations when a cause of action for a contract implied in law exists, that section does not create the cause of action. *Matheny v. Porter*, 158 F.2d. 478, 479 (10th Cir. 1946). A contract implied in law is termed a quasi-contract. *Baltimore & Ohio R.R. v. United States*, 261 U.S. 592, 597 (1922). The foundation of a quasi-contractual cause of action is the concept that one party has been unjustly enriched at the expense of another party. *Reprosystem, B. V. v. SCM Corp.*, 727 F.2d 257, 263 (2nd Cir. 1984) *cert. den.* 469 U.S. 828; *Philpott v. Superior Court*, 1 Ca1.2d 512, 519, 36 P.2d 635, 640 (1934). It is the unjust enrichment that provides the foundational basis for an implied in law contract. *Major-Blakeney Corp. v. Jenkins*, 121 Cal.App.2d 325, 339, 263 P.2d 655, 664 (1953). The implied in law contract is a remedy of last resort in that a quasi-contract remedy is not available when other remedies are available. See *Randolph v. New England Mut. Life Ins. Co.*, 526 F.2d 1383, 1387 (6th Cir. 1975). Quasi-contract, therefore, is a remedy not easily obtained because it must resort to a fiction of the law which imputes a promise to perform a legal duty. *Baltimore & Ohio R. R. v. United States*, 261 U.S. 592 at 597; *P/B STCO, 213, ON 527 979*, 756 F.2d 364, 368 (5th Cir. 1985).

The United States has never explained how it has a quasi-contract cause of action in light of the holding of both the trial court (Pet. App. 20a) and the Ninth Circuit Court of Appeals (Pet. App. 9a and 13a) that respondents

were not unjustly enriched as that term is understood in the sense required to state a quasi-contract cause of action. *United States v. State of California,* 932 F.2d at 1350 (Pet. App. pp. 9a and 10a; Pet. App. 21a).[1] As will be seen below, the United States has another remedy available to it in this situation; the need for resorting to a fiction of the law does not arise.

The United States, relying on the historical quasi-contract cause of action, argues that respondents have "wrongfully appropriated" from the United States the taxes at issue in this case. The United States relies entirely upon cases which have facts which are distinguishable from the facts of this case. The United States relies upon (1) cases between a taxpayer and a taxing agency, (2) cases in which money was taken either mistakenly or fraudulently (i.e., wrongfully appropriated) without any color of compliance with the law, or (3) cases in which the tax imposed upon the taxpayer is, in essence, imposed upon the United States thereby violating its sovereign immunity. None of these relationships is present in this action.

The United States cites *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) for a general rule that federal law will be fashioned to govern the rights of the United States to seek legal redress for duly authorized

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[1] In its brief, the United States claims the Ninth Circuit Court of Appeals did not dispute the United States' cause of action. On the contrary, the Ninth Circuit held there was no unjust enrichment, the foundation of a quasi-contract cause of action. *United States v. State of California* 932 F.2d. 1346 at 1350 (Pet. App. 9a).

proprietary transactions. The holding in *Little Lake Misere* is not broad enough to cover this case. When no federal common law is applicable, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1937); see discussion in *Powers v. United States Postal Service*, 671 F.2d 1041, 1043, 1044 (7th Cir. 1982). Thus, if the United States duly authorized proprietary relations are governed by the Federal Constitution or Acts of Congress, the courts will look to federal law. See *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). *Little Lake Misere* involved the question of whether Louisiana law could override the express terms of an agreement by which the United States acquired property under the authorization of the Migratory Bird Conservation Act. This court's *Little Lake Misere* decision reached a carefully circumscribed holding that the federal courts could fashion the governing rule of law when interpreting "a land acquisition agreement (a) explicitly authorized, though not precisely governed, by the Migratory Bird Conservation Act and (b) to which the United States itself is a party." *Id.* at 594.

In the present case, the federal courts are called upon to decide the correctness of a tax assessment (a) made under the California Sales and Use Tax Law, as enacted by the California Legislature and (b) as applied to a taxpayer which, under *United States v. New Mexico*, is to be treated as a separate entity from the United States. The federal contract between the United States and WBEC only provides the United States the opportunity to stand in the shoes of the taxpayer in challenging the respondents' interpretation of California law. The United States'

argument that the mere existence of that contract requires the federal courts to treat the United States as if it were the taxpayer is directly contrary to *United States v. New Mexico*.[2] Since *United States v. New Mexico* bars the United States from being treated as a direct party to the taxing transaction in this case, the United States is not entitled to the protection of *United States v. Little Lake Misere Co.*

Not only is the United States not a direct party to the taxing transaction between California and WBEC, the United States' interest in recouping its funds does not entail the same level of governmental activity that underlay the acquisition of property in *Little Lake Misere*. Not "every authorized activity of the United States presents an exercise of its governmental power." *United States v. Burnison*, 339 U.S. 87, 91 (1950). The fact that the United States wishes to increase its assets does not eclipse the state's interests in handling state affairs. See *United States v. Yazell*, 382 U.S. 341, 353 (1946). For example, in *United States v. Fox*, 94 U.S. 315 (1876), this Court held valid a New York law which prohibited the devise to the United States of any real estate situated in New York. Reaffirming the *Fox* holding, this Court in *United States* v. *Burnison*, 339 U.S. 87, held that it was constitutionally

[2] In contrast, in *United States v. Broward County Fla.*, 901 F.2d 1005 (11th Cir. 1990), the Eleventh Circuit was dealing with a situation where application to the local property tax to the federal building involved in that case was specifically authorized by Congress. Thus, the Eleventh Circuit was not confronted with having to conform its holding to this Court's *United States v. New Mexico* holding that, in a factual context such as the one at bar, the state tax must be treated has having been separately imposed upon the federal contractor with the United States not being a direct party to the taxing transaction.

valid for California to prohibit testamentary gifts to the United States:

> It would be anomalous to hold that, because of an amorphous doctrine of national sovereignty, the federal constitutional law reached into a California statute and made impotent that state's restrictions on the designation of beneficiaries . . . [Under the United States' argument] the United States could claim rights under the will to a testator whom the state had declared incompetent, or under a will that had not been witnessed and attested according to the laws of the state. *Id.* at 92.

It would be just as anomalous to enforce the amorphous doctrine of governmental interest espoused by the United States in this case in order to make impotent the very specific restrictions which California has placed on the state-created rights to tax refunds under the California Sales and Use Tax Law.[3] "The federal jurisdictional grant over suits brought by the United States is not in itself a mandate for applying federal law in all circumstances." *United States v. Little Lake Misere Land Co.*, 412 U.S. at 591.

[3] There can be no question that the states have the power to impose relatively short term restrictions on tax refund rights, and that these restrictions can be applied against taxpayers who are claiming refunds on any grounds, including claims that the tax was unconstitutionally collected. *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 45 (1990).

III

THE UNITED STATES' CAUSE OF ACTION CAN ONLY BE BASED UPON ANY REMEDIES WHICH WBEC MAY HAVE HAD WHEN THE UNITED STATES FILED THIS ACTION AND BY THAT TIME ALL OF WBEC'S REMEDIES HAD BEEN EXTINGUISHED

The failure of the United States to state a cause of action for quasi-contract removes the sole purported federal basis for this action. In its complaint, the United States invokes only California law as the basis of its claims. The claims are that respondents have wrongly interpreted California statutes and regulations. It asserts no cause of action except for a refund of state taxes which were paid by WBEC.

It is respondents' position that the analysis in this action must consider the tripartite nature of the relationship between the United States and WBEC, and between WBEC and State of California. The United States had a contractual relationship with WBEC and agreed to reimburse WBEC for taxes paid to the State of California. WBEC was the taxpayer and the state was the taxing agency. The United States does not claim to have been taxed, does not claim to have paid any money directly to the State of California, and does not claim to be the taxpayer. (See above at p. 6.) Indeed, the Ninth Circuit Court of Appeals held that the incidence of the tax under the California construction contractor statute did not fall on the United States. *In re Howell*, 731 F.2d at 628.

In analyzing the facts of this case, it is helpful to examine the relationship between the United States and a federal contractor when the contractor does qualify to

take advantage of the tax immunity of the United States. It is obvious that the only way there could be such a result is that the immunity of the federal contractor is derivative from its contract with the United States. "The defense is that the tax burdens the government and the respondent's right is at best a derivative one." *James v. Dravo Contracting Co.*, 302 U.S. at 158. The opposite is also true. When the taxpayer is not the government, but the contractor, and when the contractor cannot take advantage of the government's tax immunity, the right of the United States to sue for the state taxes paid by the contractor emanates solely from the contract. Therefore, in this case, any rights the United States possessed derive from the contractor's remedies under state law. This did not deprive the United States of a remedy; it provided a remedy which had been extinguished because of the United States' failure to comply with the conditions of that remedy.

The sole ground upon which the United States may state any cause of action against California is that if the taxpayer, WBEC, is due a refund, that refund should go to the United States because of the state tax reimbursement provision of the federal contract. The contractual relationship between the United States and WBEC creates an equitable assignment of WBEC's cause of action against California, which is the definition of a cause of action based on subrogation. *United States v. United Services Automobile Assn.*, 238 F.2d 364, 366 (8th Cir. 1956); *Allianz Insurance Co. v. Municipal Court*, 126 Cal.App.3d 1043, 1046, 179 Cal.Rptr. 334, 335 (1981); *Royal Indemn. Co. v. Security Truck Lines*, 212 Cal.App.2d 61, 64, 27 Cal.Rptr. 858, 860 (1963). The United States, as the subrogee of

WBEC, takes no greater rights than those possessed by the subrogor, WBEC. *United States v. Munsey Trust Co.*, 332 U.S. 234, 242 (1947); *Beecher v. Leavenworth State Bank*, 192 F.2d. 10, 14 (9th Cir. 1951) *cert. den.* 342 U.S. 953; *Liberty Mutual Ins. Co. v. Fales*, 8 Cal.3d 712, 717, 505 P.2d 213, 216, 106 Cal.Rptr. 21, 24 (1974); *March v. Barnet*, 121 Cal. 419, 53 P. 933, 934 (1898); *Randall v. Duff*, 107 Cal. 33, 55, 40 P. 20 (1895); *Redington v. Cornwell*, 90 Cal. 49, 58, 27 P. 40, 42 (1891); *Iusi v. City Title Ins. Co.*, 213 Cal.App.2d 582, 588, 28 Cal.Rptr. 893, 897 (1963). Therefore, when the subrogor has no remedies, the subrogee has no remedies. *Commercial Union Assurance Co. v. City of San Jose*, 127 Cal.App.3d 730, 734, 179 Cal.Rptr. 814, 815-816 (1982). A cause of action based on subrogation is materially different from a primary cause of action. See *United States v. United Airlines, Inc.*, 216 F.Supp. 709 (E.D. Washington, D. Nev. 1962), modified on other grounds 335 F.2d 379 *cert. den.* 379 U.S. 951.

The undisputed facts of this case show that under federal control[4] WBEC paid the tax, filed claims for refund on October 1, 1982 (J. A. 26) and May 25, 1983 (J. A. 37). The claims for refund were denied on November 22, 1982 (J.A. 22) and August 2, 1983 (J. A. 33). WBEC filed suit against the State on February 18, 1983 (J. A. 21) in one suit and on October 26, 1983 in the other suit (J. A.

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[4] The United States argues (Br. at 17, Fn. 8) that it did not submit an administrative claim for refund to the state. The facts established below show that the United States instructed WBEC's attorneys as to the steps to take throughout the administrative proceedings and the state court cases. (J. A. 58, 94, 95, 96 and 102.)

32). In 1988, those suits were dismissed pursuant to United States' direction. (J. A. 44-46; 47-49; 96).

Under California law, a claim for refund must be filed within three years of payment. (California Rev. & Tax. Code, § 6902). A court suit may be initiated only after a claim for refund has been filed (Cal. Rev. & Tax. Code, § 6932) upon only the grounds contained in the claim for refund, and within 90 days of the denial of the claim for refund. (Cal. Rev. & Tax. Code, § 6933). WBEC dismissed its state court suits in 1988, more than 90 days after the denial of the claims for refund, and under Revenue and Taxation Code section 6933 no further suit could then be brought by WBEC. The United States filed this action on May 12, 1988 (J. A. 5).

As subrogee, the United States steps into the shoes of WBEC; thus, the only inquiry is whether WBEC had a cause of action against the State of California available to it when the United States filed this action. See *United States v. United Services Automobile Ass'n*, 238 F.2d at 366. WBEC's substantive right to sue the state for a refund of taxes was created by the State of California. In addition, California conditioned this statutorily-created right by (1) requiring a claim for refund to be filed and (2) fixing the time within which any action must be brought. At least between non-governmental parties, "when the period fixed by its terms has run, the substantive right and the corresponding liability end." *Matheny v. Porter*, 158 F.2d at 479; see also *Midstate Co. v. Pennsylvania Railroad Co.*, 320 U.S. 356, 363 (1943); *The Harrisburg*, 119 U.S. 199, 214 (1886). Unless the United States as WBEC's subrogee is specially exempt from the limitations of California Revenue and Taxation Code section 6933, California's liability

to WBEC and WBEC's right to sue expired prior to the United States' filing of the complaint in this action. The United States, therefore, had no cause of action on May 12, 1988.

IV

WHEN THE UNITED STATES' CAUSE OF ACTION IS BASED UPON THE PRINCIPLE OF SUBROGATION THE CASES HOLDING THAT THE UNITED STATES IS NOT SUBJECT TO STATE STATUTES OF LIMITATIONS ARE NOT APPLICABLE

The sovereign immunity of the United States contains two basic core principles. First, the United States cannot be sued in its sovereign capacity unless it has given consent. Second, when the United States is the plaintiff in an action or has a claim in its capacity as a sovereign, that action or claim is not subject to state statutes of limitations. *Board of County Comm'rs v. United States*, 308 U.S. 343, 351 (1939). These principles do not apply in this case because the United States has not raised sovereign immunity and there are no issues with respect to the Federal Constitution or Acts of Congress.[5]

The United States asserts that there is an absolute and inflexible rule that actions by the United States can

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[5] If the rule promulgated in *Erie Railroad Co. v. Tompkins* applies to the United States when it is not asserting sovereign immunity or Acts of Congress, then it is clear that State law should be followed. Indeed, both *United States v. Summerlin*, 31 U. S. 414 (1916) and *United States v. John Hancock Mutual Life Ins. Co.*, 364 U. S. 301 (1960), relied upon by the United States, involve Acts of Congress as providing the United States' cause of action.

never be subject to a state statute of limitations. For this proposition it relies upon *United States v. Summerlin*, 310 U.S. 414 (1940) and *United States v. John Hancock Mutual Life Ins. Co.*, 364 U.S. 301 (1960). This argument, however, fails to consider the qualitative nature of the rights involved and the source of those rights.

An analysis of *John Hancock* and *Summerlin* reveals that those cases are materially different from this action. In *United States v. John Hancock Mutual Life Insurance Co.* the United States was a second mortgagee of real estate and the issue was whether the United States could redeem the property in one year, as specifically provided by federal law, despite a conflicting state law. This Court found that the only way the United States could be joined in the action was through a federal statute since the United States had not waived its sovereign immunity. As noted above, in the present case there is neither any sovereign immunity context nor any federal statute that properly applies to conflict with the limitations period of California Revenue and Taxation Code section 6933. *Id.* at 303.

In *United States v. Hartford Accident and Indemnity Co.*, 460 F.2d 17 (9th Cir. 1972) *cert. den.* 409 U.S. 979, the Ninth Circuit properly distinguished conventional statutes of limitations as found in *Summerlin* from statutes which " 'create[ ] a condition for the preservation of a potential [state] cause of action. . . . ' " 460 F.2d at 19; accord, *United States v. Studivant*, 529 F.2d 673 (3rd Cir. 1976). In *Hartford*, a Mrs. Rogers was injured in an auto accident and received care and treatment from the United States. The United States made a claim to Hartford, which was denied, and filed suit more than one year after the accident. The Ninth Circuit held that the California statute

requiring suit to be filed within one year of the accident was not a mere statute of limitations, but a prerequisite to the accrual of the cause of action against the insurer and therefore the United States was barred. See also *United States v. State of California*, 655 F.2d 914 (9th Cir. 1980); *United States v. Republic Ins. Co.*, 775 F.2d 156, 159-60 (6th Cir. 1985).[6]

California Revenue and Taxation Code section 6933 fits well within the *Hartford* distinction to the *Summerlin* rule. The equivalent federal statute to California Revenue and Taxation Code section 6933 is 26 U.S.C. § 6532, which sets a two-year limitations period for bringing a suit for tax refunds against the United States. Although in other statutory contexts the matter of limitations is something which must be raised by affirmative defense, when a sovereign such as the United States is sued for tax refunds the statutory time limitations become a jurisdictional issue. The sovereign's consent is the only source of subject matter jurisdiction, and such consent is conditioned upon the action's being brought within the conditions provided by the sovereign. *United States v. Dalm*, 494 U.S. 596, 608 (1990); *Dieckmann v. United States*, 550 F.2d

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[6] The United States attempts to distinguish *Hartford* and *United States v. California* in its brief at 18, n.10 and 23-24, n. 15 by stating that the "waiver of demand" against the State makes this case different from those. The United States errs because at the time it filed suit it did not have a valid claim. A valid claim is the ultimate "condition precedent" to filing any suit. The fact that section 6933 provides that expiration of the limitations period shall be deemed "a waiver of demand against the State" is not inconsistent with the recognition that the statute provides a condition precedent to the cause of action.

622, 623 (10th Cir. 1977). All courts apparently agree that the limitations periods set forth in 26 U.S.C. § 6532 are jurisdictional. See *Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 324 (6th Cir. 1990), and cases cited therein; see also *United States v. Dalm*, 494 U.S. 596, 602, 608-10 (1990).

The California Constitution provides for a comparable sovereign immunity as to state taxes. In the quite recent words of the California Supreme Court,

> The California Constitution expressly provides that actions for tax refunds must be brought in the manner prescribed by the Legislature. Article XIII, section 32 of the California Constitution provides in this regard: 'After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, *in such manner as may be provided by the Legislature.*' (Italics added [by the Court].) This constitutional limitation rests on the premise that strict legislative control over the manner in which tax refunds may be sought is necessary so that governmental entities may engage in fiscal planning based on expected tax revenues. [Citation.]
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> ". . . .
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> "In sum, article XIII, section 32, of the California Constitution precludes this court from expanding the methods for seeking tax refunds expressly provided by the Legislature. *Woosley v. State of California*, 3 Cal.4th 758, 789, 792; 13 Cal.Rptr. 30; 838 P.2d 758, 776, 778 (1992).

In other words, the terms of the tax refund provisions provided by the Legislature constitute conditions precedent to the continuing existence of a cause of action for

tax refund. " 'Because article XIII, section 32, of the Constitution permits tax refund suits only "in such manner as may be provided by the Legislature," plaintiff's failure to satisfy a statutory condition to suit is fatal to his action. . . . ' " *Shiseido Cosmetics (America) Ltd. v. Franchise Tax Bd.* 235 Cal.App.3d 478, 488, 286 Cal.Rptr. 690, 696 (1991), *cert. den.* ___ U.S. ___, 112 S.Ct. 2995, *reh'g den.*, ___ U.S. ___, 113 S.Ct. 395 (1992). In *Swaggart Ministries v. Cal. Bd. of Equalization,* 493 U.S. 378, 397 (1990) this Court recognized that another one of California Revenue and Taxation Code section 6933's procedural requirements for maintaining a tax refund suit conditioned the ability to proceed with tax refund suits as a matter of California law.

In this context it becomes clear that the Ninth Circuit has correctly held that California Revenue and Taxation Code section 6933, in providing that a claimant "may bring an action" for tax refund only under certain circumstances (one of which is that the action is brought "[w]ithin 90 days after the mailing of the notice of the Board's action upon a claim"), has set conditions which, if not followed, preclude any California cause of action for tax refund. The United States simply fails to recognize that the rule which applies to limit federal tax refund causes of action under 26 U.S.C. § 6532 is equally applicable under California law to limit California tax refund causes of action under California Revenue and Taxation Code section 6933. While only too happy to benefit from this rule when it is acting as a sovereign, the United States wishes to destroy the California version of this rule as soon as the United States is forced to stand in the shoes of a California taxpayer.

It is clear that the *Summerlin* line of cases does not apply to the circumstances of this action and therefore there is no legal escape from the application of the state limitations on the accrual of a cause of action.[7]

V

THERE IS NO PUBLIC POLICY REASON FOR THE UNITED STATES NOT TO COMPLY WITH THE STATE STATUTE OF LIMITATIONS

One of the issues interjected by the United States is that the Court of Appeals decision would leave the United States without an effective remedy. (Br. 26-27). The United States argues that it cannot be expected to be aware of the tax in sufficient time to effectively participate in the administrative process.[8]

The United States fails to recognize that there are somewhat competing sovereign interests at stake. The state has retained, as part of its sovereignty, the authority to tax its citizens and parties doing business in California. Thus, in the exercise of this sovereign power, the State of

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[7] "This court has long followed the rule that, unless the United States was suing in its sovereign capacity, 'in the absence of any provisions of the Act of Congress creating the liability, fixing a limitation of time for commencing actions to enforce it, the statute of limitations of the particular state is applicable.' " (*Occidental Life Ins. Co. v. EEOC,* 432 U.S. 355, 375 (1971) (Rehnquist, J. dissenting in part; quoting *McClaine v. Rankin,* 197 U. S. 154, 158 (1905).)

[8] The United States also argues that it may not be able to protest the tax at the state level. As subrogation is the basis of the United States' remedy, there should be no doubt it can step into the shoes of the federal contractor.

California is entitled to finality of its tax matters. Such finality should be in the province of the state to determine unless that determination conflicts with another, and higher, sovereign power, i.e., the United States asserting its sovereign immunity. Of course, there is no such conflict in this case.

The state requirements are not unreasonable for the United States to meet. After payment of the tax, the United States has three years to file a claim for refund. The claim for refund must specify all the issues that may be included in a court action. Three years after payment is sufficient time for the United States to determine the basis of any claimed refund. After denial of such claim for refund under section 6933, the claimant has 90 days to file its suit for refund.

Indeed, the best evidence that the United States is not harmed by being subject to state law is its total involvement in the state court suits in which WBEC was the plaintiff. WBEC's attorney stated that he was appearing on the petition for redetermination at the direction of the United States Government. (J. A. 58). WBEC's attorney acted at the direction of the United States in WBEC's state court actions. (J. A. 94, 95, 96, and 102). The United States paid $25,000 in legal fees associated with each of the WBEC state court actions. (J. A. 131-135). The United States did everything any taxpayer would have done except appear in the state court actions as a plaintiff. "Equity does not now demand that the United States be given a second opportunity to prove that the tax assessment was erroneous." *United States v. State of California, et al.*, 932 F.2d at 1352 (Pet. App. 15a.)

CONCLUSION

The judgment of the Ninth Circuit should be upheld.

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